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ABSTRACT

Jefferson Meetings on the Constitution are designed to provide a forum in which citizens can make the Constitution more fully their own through discussion of its principles and the way these principles shape the operation of the U.S. system of government. This document is a guide designed to stimulate reasoned discussion of rights and the Constitution. The topic of individual rights is complex, and the guide takes note of this complexity by examining different kinds of rights: the rights of individuals accused of committing a crime, political rights, civil liberties, economic rights, and civil rights. Various Jefferson Meeting formats for a debate about rights using this guide are suggested. In addition to suggested questions to guide discussion on various types of rights, the complete text of the Bill of Rights and subsequent constitutional amendments concerned with rights are reprinted. (DB)

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"To secure
the blessings of liberty":

Rights and the Constitution

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A Guide for Discussion of Constitutional Rights

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"To secure the blessings of liberty":

A Guide for Discussion of Constitutional Rights

This discussion guide is one in a series on constitutional reform issues developed by The Jefferson Foundation as part of The Jefferson Meeting on the Constitution project. It may be photocopied in part or in full if attributed as follows: "Reprinted from a series of discussion guides on constitutional reform issues published by The Jefferson Foundation, Washington, D.C." The Jefferson Foundation would appreciate notification from those who reproduce this material for use in other programs.

Written by Russell L. Hanson and W. Richard Merriman, Jr.

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To the Delegate - Read This First

The Jefferson Meeting on the Constitution is designed to provide a forum in which we, as citizens, can make the Constitution more fully "ours" through discussion of its principles and the way these principles shape the operation of our system of government.

The Jefferson Foundation has previously published eight discussion guides designed to stimulate reasoned discussion - during Jefferson Meetings - of proposals to change certain structural or procedural aspects of our constitutional system. One guide, for example, helps citizens weigh the "pros and cons" of the electoral college method of electing the president. Another looks at the way federal judges are selected and the length of their terms of office and invites participants to argue for and against proposals to change the way we choose judges and/or the length of their terms of office. The aim of these discussion guides was to illuminate a fact too easily overlooked: in designing the structures and processes of our national government, the framers of the Constitution were trying to bring their political values to life in the operation of our government. They believed, for example, that popularly elected judges would behave differently from judges selected in another way. They thought that judges whose continuation in office depended upon reappointment at the end of a fixed term in office would behave differently from judges who held their posts for life "during good behavior." In short, the framers of the Constitution made choices, knowing all the while, that later generations of Americans might want to reconsider those choices in the light of experience and changing circumstances. Having been inclined to think of the separation of powers, checks and balances, terms of office, and modes of appointment as rather dry matters, many Jefferson Meeting participants have been surprised to discover the key role that political values played in the shaping of the institutional and procedural arrangements of the Constitution. They have been surprised, too, at how easily discussions of such matters have challenged their intellects and stirred their passions.

The discussion of rights is different in at least two ways. First, no one needs to be told that discussions about rights are likely to be lively. We know that claims about rights are animated by values. While most Americans will admit

that they have a lot to learn about the electoral college, most can quickly compose a list of their rights and are ready to argue on behalf of their views about rights. Second, rights issues are so complex that it is difficult to organize a discussion of rights in terms of "pros and cons" or "for or against." Everyone is *pro rights*! Few Americans believe, or are willing to publicly argue, that the Bill of Rights should be eliminated. It is hard to have a debate when the issue is framed as a choice of being for or against rights. Americans' debates about rights usually occur when citizens have different views about what protections or entitlements are genuinely rights, *or* when citizens disagree what public policies ought to be pursued in protecting rights, *or* when rights seem to collide with each other and a decision has to be made about which right is more important.

This discussion guide takes note of this complexity by examining different kinds of rights: the rights of individuals accused of committing a crime, political rights, civil liberties, economic rights, and civil rights. As the guide makes clear, Americans differ in their understanding of rights. Moreover, Americans differ in their views on which rights are more important to protect.

This guide can be used to produce two different types of Jefferson Meeting debates about rights. One method is to devote an entire Jefferson Meeting to discussions about rights. The Meeting would begin with the establishment of five issue committees, including committees on the rights of the accused, political rights, civil liberties, economic rights, and civil rights. Each committee would organize itself to present a debate that illustrated differing views about a particular type of rights. The committee on economic rights, for instance, might produce one group of speakers who argue that the individual ought to have maximal freedom from government interference in his or her economic pursuits. Another group from that committee might wish to argue that each individual is entitled to a basic standard of living, or to health care, and that the protection of such economic rights requires governmental action. For this method, each committee would read the first two sections of this discussion guide - "Introduction" and "A Range of Rights" - and the section of the guide that discusses the specific type of right the committee will be discussing in depth. Each such section concludes with questions to stimulate thinking and guide discussion.

A second method would have only one committee examine rights topics, while other Jefferson Meeting committees discuss some of the structural and procedural issues previously mentioned. The committee on rights would read this entire guide. Such a committee would probably want to organize itself to present a debate, similar to those in the first method, that would examine conflicting views about the meaning of economic rights, the rights of those accused of committing a crime, and so on. But the committee would also be able to present several speakers who could illuminate tensions and conflicts between types of rights.

Whatever method is used, Jefferson Meeting delegates who discuss rights issues should read this guide's "Concluding Remarks," for this section makes it clear that our ability to make wise decisions about rights depends to a very large extent on our character as citizens and the way that character is expressed through our political processes.

Introduction: The Constitution and the Bill of Rights

The Constitution proposed by the "Federalists" in 1787 as a replacement for the Articles of Confederation made no provision for a Bill of Rights. Men such as James Wilson, a participant in the Constitutional Convention and one of the leading advocates of the new Constitution, saw no need for an enumeration, a listing, of rights. In their view, a political system based on the consent of the governed made a bill of rights unnecessary, because in such a system the people always retain the right to reconstitute a government that threatens their liberty. Where the people rule, Wilson claimed, there is no need for the special protection that a listing of rights may afford; in fact such a listing of rights may be counterproductive if it implies that people have only those rights specifically mentioned in a written constitution.

Not all friends of the proposed Constitution went this far in arguing against including a bill of rights. James Madison, for one, saw little harm in a bill of rights, though he doubted that popular governments, animated by the views of the majority, could be effectively limited by such a bill. Thomas Jefferson was more supportive, arguing that a declaration of rights, though "alloyed with some inconveniences" which might "cramp government in its useful exertions," was nevertheless worthwhile. By providing a clear basis for declaring certain acts unconstitutional, Jefferson claimed a bill of rights would make it easier for the judicial branch to regulate the actions of officials in other branches of government.

It is unlikely that we would now have a Bill of Rights were it not for the "Antifederalists," who strongly opposed the Constitution we cherish today. When the Constitutional Convention of 1787 adjourned, it presented to the nation a plan of government that dramatically increased the power of the national government. The existing system of government, created by the Articles of Confederation, was roundly criticized at the Convention. The government created by the Articles, its critics charged, lacked authority to compel the state governments to comply with its wishes, enjoyed no direct control over citizens, and was helpless to conduct foreign affairs, defend the continent from incursions by European powers, or promote commercial development. Rejecting the idea of amending the Articles of Confederation, its critics - the Federalists - called for and led in the drafting of a new plan for government.

Thus, a new frame of government was proposed "in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Such ambitious goals required significant increases in the powers of the central government. Having succeeded, though not completely, in leading the convention to draft a plan that would "energize government," the Federalists turned their attention to explaining to the American people how an energetic government could also be a limited government.

For the Federalists one of the great virtues of the proposed Constitution lay in its system of "checks and balances." It was conventional wisdom by 1787 that governmental powers needed to be separated in order to avoid dangerous concentration in the hands of a few men. But Madison argued that simply writing in a constitution that powers should be separated raised only "parchment barriers" to tyranny. The answer was to give each branch of government - executive, legislative, and judicial - a way to "check" the other branches. Thus, the president was given the power to veto bills passed by Congress. But special majorities in Congress would be allowed to override the president's veto. Many presidential appointments - including appointments to the judicial branch - were to be subject to approval by the Senate. The Supreme Court would exercise "judicial review" over the acts of Congress and the president, allowing the Court to render null and void acts that it judged to be unconstitutional. The Federalists claimed that a system of checks and balances would allow the national government to be both energetic *and* limited.

Few Antifederalists had much faith in the proposed system of checks and balances. They were certain that power would accumulate in the central government, and more particularly in the hands of the President. This premonition about the eventual "consolidation" of power led Antifederalists to insist on a bill of rights, modelled after the bills of rights contained in state constitutions of their day. Such a bill was necessary, they believed, in order to ensure a vigilant citizenry that was both knowledgeable of its rights and willing to defend them against the governmental encroachments on liberty that most Antifederalists thought were inevitable, given the "consolidating" tendencies of the proposed national government.

From the Antifederalist point of view, the Federalists' desire to establish a more "energetic" central government was dangerous. By definition, government was a threat to liberty; the prospect of a government aggressively exercising power heightened this threat by both increasing the likelihood that official actions might infringe on individuals' liberty, and strengthening the government's ability to exact compliance with its policies. Hence, the Antifederalists suspected the Federalists of plotting against liberty and advancing a scheme of government designed to protect the interests of a wealthy aristocracy.

For this reason, the Antifederalists strenuously resisted Federalist proposals to vest the central government with powers of taxation and the authority to maintain a standing army for the common defense. Indeed, the Second Amendment to the Constitution, regulating the right to bear arms, was originally supposed to preserve the people's capacity for revolution by making it possible to resist standing armies. Standing armies in a time of peace were dangerous to liberty, argued the Antifederalists, many of whom thought that the right to bear arms was an effective deterrent to military rule or the use of force in carrying out the illegitimate designs of those in power.

Even more troubling than the Constitution's explicit grants of power to maintain a standing army, levy taxes, and enact national laws superior to those of the states, were the so-called elastic clauses in the Constitution, which gave the national government broad and ill-defined powers "necessary and proper" for carrying out its responsibilities. Such powers would allow rulers to maintain themselves in office, creating a government more implacable than Britain's colonial rule, or so the Antifederalists feared. The ratification debates in the various states are replete with their warnings about the tyrannical potential of the new framework of government, and celebration of their own state constitutions with their elaborate bills of rights. No less a patriot than Patrick Henry denounced the proposed Constitution in the Virginia ratifying convention, where he argued that "This Constitution is said to have beautiful features; but when I come to examine these features, Sir, they appear to me horridly frightful: Among other deformities, it has an awful squinting; it squints toward monarchy." In Henry's opinion, the new system lacked adequate checks and balances without a bill of rights; he could not understand how the Constitution could preserve liberty, unless "perhaps an invincible attachment to

the dearest rights of man, may, in these refined enlightened days, be deemed old fashioned."

Many citizens shared Henry's belief in the importance of a bill of rights, and Antifederalists were able to draw upon this sentiment as they tried to prevent ratification of the Constitution. Ratification was far from certain in 1787. Although several small states in the northeast accepted the Constitution quickly and without condition, such crucial states as Massachusetts, Pennsylvania, Virginia, and New York only ratified the Constitution after expressing their desire for its quick amendment to include a bill of rights. Jefferson certainly supported this idea, and Madison did too, so long as the bill of rights was added by amendment after ratification of the Constitution, and not made a condition for implementing the Constitution, or used as an excuse to call a second convention to redraft the proposal. (The latter was a course of action favored by many Antifederalists, who hoped to undo what the Philadelphia convention had wrought).

Madison's willingness to accept a bill of rights helped carry the day in Virginia. Once the Constitution was ratified, it fell to the First Congress to propose amendments that would calm Antifederalist fears. Curiously, the members of that Congress were not inclined to move swiftly in this direction. As James Jackson of Georgia argued, "we ought not be in a hurry with respect to altering the constitution," especially since Congress had other pressing business to attend to, most importantly the passage of a revenue act, without which "the wheels of Government cannot move."

Ironically, it was at the insistence of Madison, who doubted the utility of a bill of rights that Congress responded to Antifederalists' call for a bill of rights. In his famous speech of June 8, 1789 Madison said:

> *It cannot be a secret to the gentlemen in this House [of Representatives, of which he was then a member], that, notwithstanding the ratification of this system of Government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities; yet still there is a great number of our constituents who are dissatisfied with it, among whom are many respectable for their talents and patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object is laudable for its motive. There is a great body of*

the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution.

Madison understood that the legitimacy of the Constitution, and the credibility of the Federalists, would be greatly enhanced by the adoption of a bill of rights. In addition, during a close campaign for election to the House of Representatives (against James Monroe who had opposed ratification of the Constitution), Madison had promised his Baptist constituents that he would seek a bill of rights in order to preserve religious liberty against state restrictions.

Thus, Madison proposed twelve amendments, which were then considered, altered and adopted by the House of Representatives and the Senate. These twelve amendments were submitted to the states for their approval in September of 1789, and by the end of December, 1791 ten of these amendments had been adopted. They comprise what we know today as the Bill of Rights. The two proposals that failed would have made the House of Representatives smaller, and prohibited the members of Congress from raising their own pay during the session for which they were elected. The latter proposal, concerning pay raises, has lately attracted renewed public interest and support.

Thus, even though the Antifederalists failed to block ratification of the Federalists' plan, they ultimately succeeded in their efforts to include a list of rights in the Constitution. The Antifederalists understood that a bill of rights is not self-enforcing, and that government officials would not necessarily respect liberties simply because they were mentioned in the Constitution. But they wanted to make the limits of governmental authority both clear and narrow in the hope that citizens would come to know their rights and zealously defend them. The fact that the Bill of Rights has become almost synonymous with the Constitution in the popular mind is an outcome that would have pleased the Antifederalists, had they known what their actions would bring.

A Range of Rights

Because of the historical legacy of the Bill of Rights, citizens of the United States share a deeply-rooted understanding of themselves as "being endowed with certain inalienable rights," to use the language of the Declaration of Independence. When we engage in politics, it is often to defend our rights or those of others for whom we choose to speak. Rights are therefore a powerful motivating force in politics. Also, when we support or oppose particular policies or procedures of government, we are in fact exercising political rights, which enable us to act upon our desires. Without rights, we would have neither reason nor means to become active in politics, as we understand it today.

But if the importance of rights is self-evident, their origin, and hence their full import, is a matter of hot dispute. Some consider rights a gift of God. As such, no human agency may transgress these rights without offending God and those who hold rights are obliged to exercise them in ways that are pleasing to God. Others stop short of claiming a divine origin of rights; they are content to view rights as part of our natural endowment, as something that belongs to us by virtue of being human. Still others treat rights as valuable social conventions that exist only as a result of interactions and agreements between individuals, and not as something that humans bring to their relations with others.

Just as the origins of rights may be questioned, so too may the content of rights be debated. Different people sharply disagree on the existence of specific rights: witness arguments about whether or not the unborn have rights. Or consider the arguments of homosexuals, who claim rights of privacy that would, if recognized by others, protect them against discrimination in housing and the workplace. And what about children: do they enjoy a full measure of rights, not only in their relations with government officials, but also with respect to parents or family guardians? Thus, even though all would agree that individuals have rights, opinions differ widely on which rights legitimately belong to various individuals.

The Constitution and the Bill of Rights identify several different kinds of rights that deserve special protection. Among these are rights controlling criminal proceedings against citizens: rights to a jury trial and legal counsel, and rights against self-incrimination, cruel and unusual punishment, and excessive bail. These are the traditional rights of the accused, and they have deep roots

in the tradition of English common law. Indeed, Americans' desire for independence was fueled in part by the denial of these rights under colonial rule. During the 1760s and 1770s the British Crown came to rely increasingly on vice-admiralty courts, composed not of juries, but rather political appointees, to enforce its policies on trade, commerce and navigation. As one patriot of the time exclaimed, this development "threatens future generations in America with a curse tenfold worse than the Stamp Act." The recovery of these legal protections was therefore one of the principle objectives of the War for Independence, and these protections remain at the center of our understanding of what the rule of law means today.

"No taxation without representation" was another rallying cry of the revolution. It was, and still is, based on the presumption that individuals enjoy "political rights" which entitle them to participate in government. Chief among these is the right to vote in elections that decide who shall rule. But participation involves more than voting, and in fact the meaningful exercise of suffrage itself requires other rights, such as freedom of association and expression. These rights are essential to popular control of government, for they allow citizens to express their dissatisfaction and organize to exert pressure upon political leaders. Without freedom of association and expression it is difficult to imagine effective opposition to government abuses of power.

Civil liberties are related to political rights. Some liberties protect against the establishment of a government-endorsed religion, while, at the same time, granting citizens the right to exercise the religion of their choice. Other civil liberties include the right to produce and consume unpopular materials, such as pornography. Such guarantees define and protect the private lives of individuals, marking areas into which governments may not intrude; they are among the most cherished of all constitutional rights. They are also the rights most often challenged by the deliberate policies and inadvertent actions of government, and there are numerous examples of churches, authors, gay rights activists, and others who by insisting on their constitutional rights, also find themselves resisting the actions of their government.

The aforementioned rights all entail protection from the abuse of political authority, and in that sense they express the historical aversion of Americans to concentrated power. Other rights, however, invoke governmental power in their behalf. The protection of civil rights, for example, often involves

action taken by the national government to prevent discrimination on the grounds of race, sex, or religious creed. That is, the power of government is brought to bear on lower levels of government that enact segregation laws. Even more significantly, the power of government may be used against individuals, associations or corporations that engage in discriminatory practices.

Such cases are of course highly controversial, since the exercise of power on behalf of blacks, women, or some other group often diminishes the liberty of whites, males, and others who tend to see antidiscrimination and affirmative action policies as an infringement on their rights. In such a situation government is at once a defender of rights and a purported violator of rights, which is why these conflicts are so politically explosive. Similar conflicts arise where claims about economic rights are involved. On the one hand, there are those who believe that property rights ought to be almost completely unrestricted, with only minimal governmental regulation or interference. On the other hand, there is a long tradition of support for policies that intrude deeply on private property rights in order to protect workers, safeguard the environment, finance a broad array of social welfare and defense programs, and reduce or eliminate unemployment. Such debates often are couched in terms of liberty, equality and fairness; they take on the language of rights, and in so doing raise fundamental questions about the meaning of rights, the role of government in preserving those rights, and the inevitable choices that must be made between rights when they collide.

Rights of Accused Individuals

Most of us assume that the Bill of Rights, as well as other rights mentioned in the body of the Constitution, help protect us from abuses of power by corrupt or misguided leaders, just as the Antifederalists believed. We also tend to equate governmental encroachments on liberty with the usurpation of power, and certainly that is one way in which the freedom of individuals may be lost or limited. However, the more common – and hence more worrisome – cases involve the exercise of power for purposes that most people value, and in ways that seem perfectly legitimate. In such cases government actions may seem reasonable or even necessary, but that does not change the fact that these actions indisputably diminish the liberty of individuals affected by policies, or even deprive them of their lives or livelihood.

The conflict between individual rights and collective needs is frequently evident in procedures for apprehending and trying suspected criminals, and punishing those who are convicted of crimes. All citizens value the personal security and safety of possessions associated with "law and order," and in political philosophies of every stripe, government is assigned important powers for maintaining social peace. The proper extent of those powers is a matter of debate, however; under certain circumstances, truly invasive powers may be needed to combat crime effectively. Is that consistent with protecting the rights of the accused?

If crime is a very serious problem, many citizens might be willing to grant extraordinary leeway to police and other government officials to, say, fight a "war on drugs." Yet this often contradicts the principle that suspects are "innocent until proven guilty," a fundamental maxim of our society. If we truly adhere to this principle, it is necessary to restrict police powers, even when that makes law enforcement difficult. Preventive detention – detaining individuals who, it is believed, intend to commit crimes – may be an effective way of combating crime, but it is inconsistent with the presumption of innocence. Similarly, most people believe that it is wrong to force suspects to give testimony that will help the state convict them. According to them, the burden of proof is on the state, as the agent of the people, to gather convincing evidence, and to do so in ways that are above reproach through legal searches, seizures, and interrogations. Finally, harsh sentences for those convicted of certain crimes may be extremely popular, but that does not eliminate constitutional restrictions on cruel or unusual punishment, arbitrary sentencing, and the like.

This conflict between rights and the pursuit of legitimate social goals is not a theoretical or speculative one. Recently, the Supreme Court upheld the constitutionality of mandatory drug testing as a condition of employment for certain kinds of government jobs, and there is widespread support for testing pilots, engineers, and ship captains when they are involved in accidents. Similarly, William Bennett, the "drug czar" in the Bush administration, has proposed radical measures to combat the use and sale of drugs in the nation's capital. Among other things, Bennett suggested that drug users convicted of nonviolent offenses be sentenced to "shock incarceration." Rather than serving time in county jails or on probation, they would be sent to paramilitary programs similar to boot camps, and subjected to intense disciplinary regimes. His plan

was immediately criticized by persons who objected to recommendations they believe are unconstitutional.

Although they may impede effective policymaking, the rights of the accused are designed to reduce the possibility of punishing the innocent. After all, imprisonment is a deprivation of liberty, and capital punishment ends life prematurely. Such penalties may never be imposed lightly, but a society that values individual liberty very highly must take special pains to avoid harming those who are not guilty of charges made against them. The "special pains" involve procedural safeguards that make it more difficult to apprehend, convict and punish the perpetrator's crime, because the safeguards are available to the guilty, as well as the innocent. Some guilty persons may, indeed, go free in order to reduce the chances of unjustly punishing the innocent.

The best known rights of the accused are found in the Fourth, Fifth, and Eighth Amendments to the Constitution, which prohibit unreasonable searches and seizures, forced self- incrimination, cruel and unusual punishment, and excessive bail. The Sixth Amendment provides for a speedy trial, the right to confront witnesses, and access to counsel. Other important rights are mentioned in the body of the Constitution. The Constitution prohibits "bills of attainder," which limit the rights of specific individuals, and "ex post facto laws," that is, the punishment of persons for acts committed before these acts were made illegal. The Constitution also insures the right to a jury trial in criminal cases and guarantees "habeas corpus," preventing unlawful detention except in times of war or emergency.

Questions to Guide Discussion About the Rights of the Accused

- What are the specific rights granted by the Constitution to persons accused of committing crimes?

- What other rights, like the prohibition against unreasonable searches and seizures, affect the way government must deal with persons suspected of criminal activity?

- On television shows we see persons who have been arrested having their rights read to them by police officers. Can you trace these rights to their origins in the language of the Constitution?

- Do you agree with the current requirement that arresting officers inform arrested persons of their rights? Why?

- The U.S. Supreme Court has ruled that evidence against a person accused of committing a crime must be obtained in accordance with the rules of the Constitution. The "exclusionary rule" excludes any other type of evidence from the courtroom. How does such a rule affect the criminal justice system?

- Some people assert that the operation of our criminal justice system pays too much attention to the rights of the accused and not enough attention to the rights of law abiding citizens. Do you agree or disagree? Why?

- What does the Constitution say about the rights of persons convicted of committing crimes? How would you define "cruel" or "unusual" punishment?

- The Supreme Court is often called upon to strike a balance between the welfare of the law-abiding and the rights of persons accused or convicted of committing crimes. The framers of the Constitution made the Supreme Court the part of national government that is most insulated from public influence. How has that insulation affected our society with respect to the rights of the accused and convicted? Would you favor more, less, or the same amount of public influence on the judicial branch? Why?

Political Rights

Political rights are individual rights exercised by those who engage in political activities or other public performances with political significance. These rights make citizenship meaningful. The First Amendment, for example, guarantees freedom of assembly and expression, as well as the right to petition the government for redress of grievances. Some hold these rights to be absolute and without limit, because they partially define what liberty means. According to them, only individuals who are free to assemble and express their opinions may be said to enjoy liberty; without these rights, liberty would not exist, at least in robust form. And without liberty, individuals would not be free to pursue happiness as they understand it, and our society would realize fewer of the benefits often said to derive from pluralism, like diversity, innovation and tolerance.

But political rights are valuable for other reasons, too. Freedom of assembly, expression and, some say, the right to bear arms, may enable citizens to resist government when officials abuse their authority. On this point the Federalists and Antifederalists agreed: the people themselves are the ultimate "check" upon usurpers of power, just as they are the final judges of the adequacy of constitutional arrangements. Where frameworks of government are "constituted" by the people, and rulers are either directly or indirectly accountable to citizens, the people are sovereign, at least in principle. In practice, rights make it easier for people to exercise their sovereignty.

After all, the withdrawal of consent by the governed may not lead automatically to a recovery of power from those who occupy positions of authority. Tyrants often exercise power simply because their might is irresistible, and not because they are entitled to do so. Still, the existence of rights such as those contained in the First and Second Amendments makes it easier to resist would-be tyrants. These rights enable opposition to form and popular "checks" upon tyrants to operate. Of course, real tyrants would move quickly to squelch assembly and free speech, and to disarm citizens, so as to consolidate their hold on power. However, as Madison himself noted, where rights are explicitly stated in a written Constitution, they achieve the status of fundamental maxims and become part of every citizen's outlook on politics. As

a result, citizens become jealous of their rights, and guard vigilantly against infringements on them. Rights then become much more than words written on paper; they enter into the character of individuals, creating a "standing" opposition to tyrants.

Thus, rights against government, as we might call them, are a crucial part of our constitutional legacy, growing out of our forbears' experience with colonial rule, and informing a political tradition deeply and irredeemably suspicious of governmental authority. Government may be necessary, insofar as it establishes a framework of law and order within which happiness may be pursued in a relatively safe and secure manner. As John Locke put it, government is an indispensable remedy for all of the "inconveniences" that arise in a society comprised of individuals willing to take matters into their own hands when others harm them, whether inadvertently or otherwise. In that condition, rights and liberties may exist, but only to the extent that an individual is strong or cunning enough to enforce them. Much stronger guarantees of rights are possible where government is empowered to defend them against violations by other individuals acting out of malice, want, ignorance or simply in the course of exercising their own legitimate rights.

Yet the same government which secures rights from violation by others may also pose a threat to rights, as Locke and others well knew. The concentration of power that is necessary for government to fulfill its basic responsibilities is subject to abuse by rulers, who are human beings liable to temptation and a desire to secure their own happiness or that of people close to them. Government may be necessary, but the fact that it must be administered by fallible human beings makes it a necessary evil, requiring constant surveillance by a vigilant citizenry. Indeed, the only reliable protection against the abuse of governmental power is popular control, whether that be exercised through revolutionary upheavals, or through elections and other, more regular, channels of participation which convey the consent of the governed.

Thus, any invigoration of government must be accompanied by increased accountability and meaningful opportunities for political participation. In the United States, the extension of popular control has proceeded on two fronts. First, the right to vote is now almost universal for adults (felons and the insane are excluded). At the time of ratification, voting rights were limited to white males who were twenty-one or older, and who held property (the amount and

kind required varied from state to state). Property qualifications were gradually eliminated during the nineteenth century, and their modern equivalent – the poll tax – was abolished by the Twenty-fourth Amendment. In 1870, the Fifteenth Amendment extended the vote to black males who were twenty-one or older, and women became eligible to vote in 1920, with the passage of the Nineteenth Amendment. Finally, the Twenty-sixth Amendment lowered the voting age to eighteen in 1971, largely in response to claims that those who were old enough to be drafted for the war in Vietnam were entitled to help choose those responsible for American policy in Southeast Asia.

Popular control has been extended in a second way as well, by subjecting more officials of the national government to direct election by the people. For example, the Seventeenth Amendment made United States Senators directly accountable to citizens. Prior to 1913 only members of the House of Representatives were elected directly; Senators were chosen indirectly by state legislatures. While the president and vice-president are still chosen by the electoral college, rather than through popular vote, electors in the college are no longer expected to exercise any discretion. Electors are now chosen by voters and almost always cast their presidential votes in accordance with the wishes of the voters who elect them.

Of the sixteen amendments ratified after 1791, when the Bill of Rights was adopted, four involved extensions of suffrage, and a fifth – the Twenty-third – allowed residents of the District of Columbia to vote in Presidential elections. Another established the direct election of Senators, and yet another clarified the role of the Electoral College in choosing the President and Vice-President. Since the Eighteenth Amendment, which prohibited the manufacture and sale of alcohol, was repealed by the Twenty-first Amendment, fully one-half of the subsequent amendments to the Constitution dealt with the expansion of popular control over government.

Of course, the progress toward universal suffrage does not ensure that government will be popularly controlled; it merely creates the conditions under which governments may be held accountable for their actions. It remains for the people to exercise their right to vote and express their opinions on issues of the day. For this, freedom of speech and assembly are essential, though the exercise of these freedoms by individuals who hold unusual or extreme views may strike others as being disloyal or even treasonous. The Supreme Court plays a crucial

role in deciding where legitimate opposition ends and improper behavior begins, and in recent years the justices have been more permissive than either government or political majorities have liked.

Thus, in 1989 a majority of the Court upheld the First Amendment rights of Gregory L. Johnson, who burned an American flag in protest during the Republican Party's 1984 national convention in Dallas. A Texas law prohibiting desecration of the flag was unconstitutional, asserted Justice William Brennan, who argued that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." To prohibit free expression, Brennan insisted, was to undermine the marketplace of ideas and the very principles of democracy. "We do not consecrate the flag by punishing its desecration," he concluded, "for in doing so we dilute the freedom that this cherished emblem represents."

Chief Justice Rehnquist dissented strongly, saying "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people – whether it be murder, embezzlement, pollution or flag burning." Though he lost the legal argument, Rehnquist expressed a widely-held sentiment which may yet produce a constitutional amendment to restrict the freedom of speech currently protected by the Supreme Court's interpretation of the First Amendment. In this case, and in many others, rights are subject to redefinition through political, as well as legal, processes.

Not all speech or expression has been equally well-protected by the Supreme Court, however. Historically, the justices have tried to balance the right to express political opinions against other considerations, like the desire to prevent violence in response to inciting speeches or "fighting words," or other expressions that pose a clear and present danger to public well- being. Members of the Communist Party and other radical organizations have frequently found their freedom of expression curtailed in the interests of national security, although the Court now imposes demanding tests of "threatening" action before restricting these rights.

A very different kind of threat arises from the fact that freedom of expression, which makes political participation especially meaningful, also permits some groups to obtain more influence in politics than others. In

particular, the power of interest groups and political action committees (PACs) is often said to subvert democracy by allowing persons and organizations of great wealth to dominate politics. Watchdog groups such as Common Cause, for example, believe that representative government in the United States is under siege because "Our system of financing congressional campaigns allows special interest groups to gain disproportionate access to lawmakers in order to influence decisions in Congress. As a result, increasingly political issues are being decided not on their merits but out of deference to wealthy campaign donors" (People Against PACS, 1983).

Ironically, the rise of political action committees may be traced to prior efforts to reduce the role of money in politics. PACs are a response to the Campaign Finance Law of 1974 which, among other things, limited campaign contributions and expenditures, and mandated public disclosure of the names of contributors to political campaigns. The constitutionality of the law was tested in *Buckley v. Valeo* (1976), where the Supreme Court held that ceilings on campaign expenditures, limits on spending by candidates on their own behalf, and restrictions on independent spending by individuals and groups were unconstitutional infringements on freedom of expression. Since that decision, the number and financial significance of PACs has grown rapidly, leading to the situation decried by Common Cause.

If additional reforms are forthcoming, they will constitute a new balance between the desire to reduce or eliminate undue influence in politics, and our commitment to freedom of expression for all, poor and rich alike. Both values – that of political equality and individual liberty – are central to democracy as we understand it, and so a balancing of the two is unavoidable. The issue is where to draw the line, and that depends on how we view the circumstances in which we now find ourselves. Those who see little danger from PACs are not inclined to re-strike the balance. On the other hand, those who are concerned about the unrestrained power of PACs feel that free speech has demonstrable costs for democracy, when money talks so loudly in politics.

Questions to Guide Discussion About Political Rights

- The right to vote is a fundamental political right. Has that right now been extended, at least in principle, as far as it can? Are there any other groups in American society who should have the right to vote but do not?

- A major tendency in American political history has been to bring more and more of government under the direct control of voters. Has that process been completed now, or are there ways popular control could be further expanded? Do you share Madison's concerns about the tendency of popular government to become a "tyranny of the majority?" Why?

- The rights to associate with others, assemble, and express political views are guaranteed in the Constitution. In interpreting the Constitution the Supreme Court has allowed some limitations on the exercise of these rights. Do you favor certain limits, oppose all limits, or do you think each situation needs to be examined separately?

- Should people who hate the American system of government be allowed to claim constitutional protection for the right to say so or to engage in acts, like flag burning, that express such a view? What about people who support our system of government but oppose certain policies and wish to express this opposition? Is there a difference between these two types of people? Why?

- The historical expansion of the right to vote in the United States has often been portrayed as an effort to achieve political equality: one person, one vote. The Supreme Court has ruled that spending money in political campaigns is a form of political expression and cannot be limited. Does this view of campaign spending as speech undermine the ideal of political equality by giving wealthy individuals and groups undue influence in politics? Can the ideal of political equality be reconciled with the need for unfettered political speech? If not, which should have precedence?

Civil Liberties

As opportunities for popular control over government increase, so does the risk of the "tyranny of the majority" over minorities, political or otherwise. Though Madison and other Federalists were sensitive to the possible usurpation of power by rulers, they understood that popular control is a double-edged sword. A high degree of popular control may be necessary to prevent people in government from abusing their authority, or minorities from ruling majorities. However, instruments of popular control also permit majorities to exert their will through the government, to the detriment of minority rights.

Unless majorities are respectful of minority rights, they may rule tyrannically through government. That is why civil liberties are such an important part of our constitutional tradition. Our First Amendment rights belong to all, but those who are in the majority have little need for legal guarantees; their strength lies in numbers. It is nonconformists who are at risk, and for whom civil liberties offer a defense against efforts of the majority to limit the speech and actions of those it finds objectionable or obnoxious.

For instance, in 1977 members of the American Nazi party applied for, and received, a permit to parade in Skokie, Illinois – a city with a substantial Jewish population, including many survivors of the Holocaust. At the request of those offended by the Nazis' intentions, a state court ordered the Nazis not to wear party uniforms, display the swastika, or distribute incendiary pamphlets. The Illinois Supreme Court refused to block the lower court's order or expedite its appeal. Upon appeal to the U.S. Supreme Court, the Nazis won the right to march in Skokie, but they subsequently canceled their plans and instead a small number rallied in a Chicago park.

This example is often cited as a reminder of the need to protect the right of free expression. Groups that espouse popular or conventional ideas face little danger from other groups or governments, since their expressions are generally not very offensive. The need for protection arises in cases where highly unpopular groups express themselves, particularly if they do so in provocative ways. As prominent legal expert, Norman Dorsen has observed, "Strong and determined opponents of human rights have always used the rhetoric of patriotism and practicality to subvert liberty and to dominate the weak, the

unorthodox, and the despised," making the defense of civil liberties indispensable, though often thankless.

In the Skokie case, the Supreme Court stood against popular sentiment, upholding the rights of Nazis to exercise free speech. But only a handful of recent justices of the Supreme Court, e.g. William O. Douglas, have contended that the First Amendment, along with the Fourteenth, absolutely protect all forms of expression. Douglas reasoned that curbs on expression were arbitrary, and that in a free society individuals must be free to say, see or hear what they will, no matter how repulsive their choices may be to the majority. Otherwise, it will be impossible to protect the free exchange of ideas, whether good, bad or, after the appearance of Salman Rushdie's *The Satanic Verses*, pious or blasphemous.

However, most justices do not view freedom of expression absolutely; they are willing to allow restrictions on certain kinds of speech. For example, the Supreme Court recently concluded that although state laws may not limit "indecent" speech, it was permissible to impose limitations on forms of expression that are deemed obscene. According to the Court, indecent (but not obscene) speech is commonly used in the so- called "dial-a-porn" telephone message services. In the view of Justice Byron White, the valid goal of preventing children from being exposed to indecent messages could not justify a complete ban that also prevented adults from having access to materials protected by the First Amendment. As he put it in his opinion for the majority, the federal law struck down by the Court "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear . . . It is another case of burning up the house to roast the pig." Yet the justices are willing to regulate materials that are obscene, though the Court has been unable to discover a satisfactory definition of obscenity: Justice Potter Stewart once admitted that he could not define pornography, but he knew it when he saw it. Now, the Court allows communities to determine what is "obscene" in a particular locale. In *Miller v. California* (1973) the justices decided to allow restrictions on material that the average person, applying contemporary community standards, finds appealing to the prurient interest; or which depicts, in a patently offensive way, sexual conduct regulated by state law; or work, taken as a whole, that lacks serious literary, artistic, political, or scientific value.

Not all restrictions on the production and sale of pornography pass the tests outlined in *Miller*. In Indianapolis, Andrea Dworkin and Catharine MacKinnon helped persuade municipal authorities to adopt a very strict ordinance against trafficking in pornography, only to see it struck down in federal court because it abridged freedom of expression (though the judge conceded that pornography may contribute to violence against women and children). In reaction, MacKinnon likens the Indianapolis case to the case of Dred Scott, concluding that "The struggle against pornography is an abolitionist struggle to establish that just as buying and selling human beings never was anyone's property right, buying and selling women and children is no one's civil liberty."

The American Civil Liberties Union believes otherwise, and it has been joined by some religious groups who oppose ordinances such as that adopted in Indianapolis. Ironically, the very same Amendment which protects forms of expression that many regard as pornographic also guarantees religious freedom in the United States. If restrictions on free speech were allowed to stand, so might limitations on religion be found constitutional, or at least that is what some religious leaders fear.

This apprehension may seem misplaced, given the Supreme Court's recent decisions on cases involving the establishment of religion, which is prohibited under the First Amendment. To the disappointment of many religious groups, the Court has consistently ruled against policies designed to require or promote prayer in school. It has even condemned "moments of silence" set aside for voluntary prayer as unconstitutional. Public assistance for parochial schools has been likewise prohibited, as have tuition credits for parents who send their children to religious education institutions.

However, the Supreme Court has not always maintained a high wall of separation between church and state, especially where the practice of religion is concerned. In *Minersville School District v. Gobitis* (1940), for example, a majority of the Supreme Court upheld the authority of local school districts to require flag salutes of pupils, a practice contrary to the religious teachings of Jehovah's Witnesses. A wave of persecution followed, as Jehovah's Witnesses were branded unpatriotic. Yet three years later, in the midst of World War II, the Court reversed itself in *West Virginia State Board of Education v. Barnette* (1943), saying that "the action of the local authorities in compelling the flag

salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to protect." In short, no one may be compelled to recite things they do not believe, for as Justice Robert Jackson put it, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Wartime patriotism can also be hazardous to rights. In the face of extraordinary danger, expediency may indeed require that we sacrifice certain rights until the danger passes. The Great Emancipator Abraham Lincoln himself refused to honor a writ of habeas corpus issued by Chief Justice Roger Taney, when a Southern agitator in Maryland was arrested for hindering the northern war effort. Similarly, martial law was declared in Hawaii after the bombing of Pearl Harbor, and continued until late 1944. In the interim, grand jury proceedings, trial by jury, the subpoenaing of witnesses, and the issuance of writs of habeas corpus were suspended, and all criminal cases were tried under military procedure. And on the mainland, Japanese-Americans were placed in detention camps in direct violation of their rights.

Actions like these are extreme, and it is certainly possible that rights may be abridged prematurely, or too severely, under guise of national emergency or military involvement. Thus, in 1971 the Nixon administration secured injunctions against The New York Times and the Washington Post preventing publication of the "Pentagon Papers," which had been leaked to the press by Daniel Ellsberg. The papers were part of a classified study of the circumstances leading to United States involvement in Vietnam. A divided Supreme Court rejected arguments that publication of the papers endangered national security, holding that the government had failed to justify the exercise of "prior restraint" in blocking publication.

In his opinion on the case, Justice William Brennan insisted that "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. Secrecy in government," he continued, "is fundamentally undemocratic, perpetuating bureaucratic errors." For, as Justice William O. Douglas wrote, "Only a free and unrestrained press can effectively expose deception in government" — a point emphasized by Justice White, who noted that an enlightened citizenry is the only

effective check upon executive power in the areas of national defense and international affairs, where the powers of Congress are limited.

Questions to Guide Discussion About Civil Liberties

- Civil liberties protect individuals and groups from potential abuses of governmental power and from the "tyranny of the majority" by forbidding governmental regulation of certain activities and realms of life. Why are the realms of religion, expression, and press activities specifically protected? Do such protections make the United States a better society than it would otherwise be? Why?

- Do you think there are any occasions when the government – either acting on a view of our best interest or responding to the wishes of the majority – should limit the free exercise of religion? If so, what situations, in your opinion, would justify such limits?

- Do you think there are occasions when freedom of expression could be justifiably limited?

- Are there situations that would justify limiting press freedoms?

- How would you make the strongest case for maximum enjoyment of civil liberties? How do such liberties make ours a good society?

- How would you make the strongest case for curbing some civil liberties? How would such limits make ours a good society?

- Some people think that limiting civil liberties as a way of dealing with, for instance, pornography, is a "cure that is worse than the disease?" Do you agree, or do some "diseases" require such "cures?" Why?

Economic Rights

In the Declaration of Independence Thomas Jefferson's list of inalienable rights was short. It included "Life, Liberty and the pursuit of Happiness." Jefferson may have borrowed this expression from John Locke, who described the principal function of government as the preservation of life, liberty, and property, the latter being crucial to happiness. Locke understood the pursuit of happiness to mean seeking pleasure and avoiding pain, and he assumed that the acquisition of possessions was inextricably bound to this pursuit. Those without possessions are in want, or pain, while those with possessions have the wherewithal to satisfy their wants and please themselves (perhaps by assisting others). In this view, property is the foundation of happiness, and a government that secures property makes possible the individual pursuit of happiness.

Jefferson shared Locke's conviction about the intimate relation between property and happiness, but he allowed the government a positive role in expanding property rights. Because Locke thought property rights existed independently of government, a government's sole responsibility was to defend those rights. In contrast, Jefferson believed that government itself could create property rights, and in so doing expand opportunities for individuals to pursue happiness as they understood it. Hence Jefferson advocated the abolition of traditional rights of inheritance which favored first-born sons while limiting the opportunities of younger siblings to acquire property. As President, Jefferson also pursued expansionary land policies, most notably the Louisiana Purchase, as a way of making it easier to obtain property and the economic and political independence that went with ownership of land.

Thus, Jefferson – who assured us "that government is best which governs least" – also showed us how an active government might contribute to the general happiness. That ambivalence has marked subsequent debates over the most appropriate role of government in economic affairs: should government support property rights, without interfering in economic affairs, because such interference inevitably leads to reduced opportunities for the individual pursuit of happiness? Or must government seek broader opportunities, or even guarantees, for those who are unable to achieve a modicum of happiness because they lack property necessary to live decently?

In large part this is a question of policy, but since the New Deal of Franklin Roosevelt, it has been increasingly perceived as a matter of rights. Prior to Roosevelt's election, the national government had little responsibility for insuring the economic security of individuals (except for paying pensions to war veterans). State and local governments could, if they chose, provide "relief" to those in need of assistance; however, this assistance was far from universally available, and was typically far from adequate, even during normal times. The Great Depression, which left one-fourth of the work-force unemployed, and "one-third of a nation, ill-housed, ill-clad, ill-nourished," overwhelmed these relief programs. The New Deal shifted the responsibility for assistance to the national government, and thereby made it more acceptable to society at large.

Thus, with the passage of the Social Security Act in 1935, the national government established for the first time in our history an elaborate "safety net" of policies to protect individuals against loss or insufficiency of income. Among the programs created were a social insurance program ("social security"), an unemployment insurance program, and public assistance programs for the aged, blind and disabled, and dependent children. Through these programs, the federal government assisted those who were unable to provide for themselves, and supplemented the retirement income of workers who had made insurance contributions when they were employed. The beneficiaries of government policy received cash assistance from the treasury, which funded these programs out of tax revenues. Systematic redistribution of income was therefore the legacy of Roosevelt's New Deal.

The safety net has been greatly strengthened since the New Deal. More workers have been included under social security and unemployment compensation, and new categories of assistance have been created. In addition, Lyndon Johnson's War on Poverty made new forms of aid available; Medicare health insurance and Medicaid health care are perhaps the leading examples of this. The cash and services made available to citizens under these programs are popularly and legally regarded as "entitlements," that is, as benefits that belong rightfully to those who reside in this country. Those who qualify are entitled to benefits, and they may legally sue to receive them, and to contest decisions that affect their eligibility.

Under existing laws, there is no question that individuals may claim assistance perceived as rightfully theirs. But there are those who say that these laws, though they may be expedient, do not derive from any fundamental right of individuals, such that governments are obligated to redistribute income through entitlement programs. Indeed, those who argue against government efforts to redistribute income argue that such policies are not only counterproductive, but also unjust, insofar as they infringe on the rights of individuals to acquire and dispose of their property as they see fit. The infringement is in the form of taxes that some individuals must pay in order to support programs that redistribute income to the poor, and this has generated a significant backlash against efforts by "big government" to establish a "welfare state."

Many of the policies pursued by Ronald Reagan during his term in office were sympathetic to this view. Indeed, at a 1987 celebration of Independence Day held at the Jefferson Memorial, Reagan called for an "Economic Bill of Rights" to guarantee four fundamental freedoms. The first freedom stressed by the President was the freedom to work: "You have the right to pursue your livelihood in your own way, free from excessive government regulation and subsidized government competition." The second was the freedom to enjoy the fruits of labor: "You have the right to keep what you earn, free from excessive government taxing, spending, and borrowing." Reagan also advocated the freedom to own and control property as central to liberty: "You have the right to keep and use your property, free from government control through coercive or confiscatory regulation." Finally, he endorsed the freedom to participate in a free market: "You have the right to contract freely for goods and services and to achieve your full potential without government limits on opportunity, economic independence, and growth."

According to Reagan, the realization of these freedoms required a substantial reduction in governmental activity by means of deregulation, privatization, and retrenchment. Precisely opposite measures were envisioned by opponents of the Reagan administration, who also believed in the need for an economic bill of rights, though they had a very different set of rights in mind. This alternative conception of economic rights calls for vigorous action by the government to combat discrimination, provide security, establish equity, and promote economic democracy.

Thus, economists Samuel Bowles, David Gordon, and Thomas Weisskopf defend a right to economic security, which entails policies to achieve full employment without discrimination in hiring or pay, and publicly supported child-care for working parents. They affirm workplace democracy, with meaningful participation by workers and the public in corporate decisionmaking. They also believe in economic planning, and political controls on money and investment. Finally, they see an active fole for government in promoting a better way of life, by providing a national health policy, lifetime learning and cultural opportunities, and conservation measures.[1]

Obviously, this is an argument for the expansion of the welfare state. It presumes the existence of welfare rights, which are based on the idea that a proper respect for the dignity of individuals requires provision for the needy and vulnerable. In this view, such a provision is mandatory; it cannot be left to charity, as that is both insufficient to meet needs, and fails to recognize that individuals are entitled to assistance. Just as governments protect citizens from violence and depredation, so also must they secure them from hunger, illness, and lack of shelter. These latter forms of security are no less important. Hence, they too are just as much rights as the former. The provision of basic entitlements is therefore perceived as vital; given this view, justice demands the welfare state.

Those who would restrict government intervention in economic matters accept the need for welfare programs, but at significantly lower levels of support than exist at the present time. Critics of the welfare state believe that current entitlement programs are ineffective, or worse, counterproductive, to the extent that they breed dependence on welfare. They reject the idea that public assistance is a matter of right. As Roger Pilon, of the Cato Institute, has stated:

1 Samuel Bowles, David M. Gordon and Thomas E. Weisskopf, *Beyond the Wasteland: A Democratic Alternative to Economic Decline*. Garden City, NY: Anchor Books, 1984.

the free society, then, is not an egalitarian society. Different people will start and end at different levels as they work their way through life; some will improve their situation, others will go in the opposite direction. For those few who are unable to handle the vagaries of life, for whatever reason, private, and if necessary, public assistance is available -- this last not by right, but, indeed, in violation of the rights of those forced to assist, the hope being that the violation will be de minimus.

Pilon articulates a point of view with considerable currency today, as is evident in Ronald Reagan's ability to capitalize on popular resentment of the welfare state. Yet the notion that people are entitled to assistance as a matter of right could grow stronger as the number of people in need increases, and the necessary aid changes form. This is especially likely if the number of people who cannot afford private health care expands even more than it has. Many of these thirty-seven million people earn too little to buy insurance or pay for professional services, but their incomes are too high to qualify for Medicaid and other programs for the indigent. Already this problem has produced claims that access to health care is a basic right to which all citizens are entitled, regardless of their ability to pay, and generated numerous legislative proposals for national health insurance, a national health service, and the like.

Questions to Guide Discussion About Economic Rights

- Do you agree with Locke's view that the right to own property is essential for happiness? Why?

- Where does the right to own property come from? How does the origin of this right, in your opinion, affect the role of government in regulating, taxing, or redistributing property?

- Does the creation of Social Security, Medicare, Medicaid, and other programs to assist Americans mean that Americans now have a *right* to such benefits? Are these types of benefits essentially the same as, for instance, the rights listed in the Bill of Rights?

- Would you say that giving Americans the fullest opportunity to enjoy their economic rights requires a reduction or an expansion of governmental involvement in economic and social matters?

- Roger Pilon asserts that paying for public assistance to persons needing help should be viewed as a violation of the rights of those forced to assist and should be minimized. Do you agree?

- In a society that adequately protected its citizens' economic rights, would there be large differences in wealth or would most people have about the same standard of living? Why do you think so?

- Is there a right to adequate health care?

- If individuals are to respect each other's economic rights, what kind of behavior is required?

Civil Rights

Our political tradition emphasizes the rights enjoyed by citizens against their government. That emphasis is rooted in suspicions about the inevitability of encroachments on liberty by those who, by virtue of their position in government, wield enormous power over those who are ruled. Yet the preceding discussion of economic rights suggests that many people believe that the powers of government may work for liberty as well. In their opinion, the exercise of power need not diminish liberty; it may very well increase freedom by granting or guaranteeing rights which, in the absence of governmental action, might never be realized.

Nowhere is this more apparent than in the area of civil rights, where majorities have historically subjected minorities to gross abuses of power. It is in the realm of civil rights that the "tyranny of the majority," operating through agencies of government sympathetic to prevailing sentiments, is most likely to occur. Indeed, it was precisely for this reason that Madison was not optimistic about the utility of adding a Bill of Rights to the Constitution. In his own state of Virginia, with a widely admired bill of rights, majorities trampled religious freedom under foot and, in addition, maintained a system of chattel slavery.

The passage of the Fourteenth Amendment provided minorities with a powerful recourse against surrounding majorities. The amendment, which was approved in 1868, guarantees that no state shall "deprive any person of life, liberty, or property without due process of law." Since then, the Supreme Court has used the due process clause to "nationalize" the Bill of Rights. In a series of decisions, the Court has ruled that individuals have the same rights against state and local governments that they have always enjoyed against agencies of the national government. Those who have been victimized by local or state majorities may even appeal for relief to the federal courts, which in recent decades have frequently demanded redress from local and state officials.

The due process clause has figured prominently in striking down the legal basis for racial segregation in states and localities. Just as important is the Fourteenth Amendment's requirement that governments – local, state and national – insure that all persons within their respective jurisdictions be afforded equal protection under the law. Laws may not discriminate on the basis of race, color, religion, sex or national origin, or at least that is how the

Supreme Court has come to interpret the clause since its ruling in *Brown v. Board of Education* (1955), which made segregation unconstitutional and required authorities to proceed with "all deliberate speed" to integrate local school systems.

Thus, by successfully claiming protection under the Fourteenth Amendment, minority groups who are the victims of discrimination have found an important ally in the national government in their struggle against state and local governments sympathetic to the wishes of regional majorities. Desegregation, ordered by Federal courts, is a familiar example of this intervention by national policymakers on behalf of minorities. Increasingly, the powers of the national government have been brought to bear against state and local governments, businesses, employers, fraternal organizations, country clubs and private individuals who engage in actions that discriminate against others. This is a concerted effort to curb the most egregious "tyranny of the majority" in the history of our nation: the subjection of blacks by whites under "Jim Crow" laws in the South and similarly restrictive practices outside that region.

Actions to curb discriminatory practices now enjoy wide support, although in the past some individuals objected to antidiscrimination measures as an unwarranted intrusion by government in private affairs. For example, homeowners and real estate agents often used to enter into agreements called restrictive covenants, which prevented the sale of private property to blacks, Jews, or other groups considered "undesirable" neighbors. In 1948 the Supreme Court found such covenants unconstitutional. Now the property rights of individuals may not be exercised in a discriminatory fashion, contrary to the claims of those who hold these rights to be absolute.

Similarly, large majorities now endorse laws and policies which prohibit discrimination in hiring, public accommodation and housing. But support is much weaker for affirmative action, which goes beyond antidiscrimination measures by trying to undo the consequences of historical patterns of discrimination. This may be attempted by setting goals for hiring members of minority groups, establishing targets for admitting women and minorities to schools, and earmarking a portion of spending on public works for minority contractors. All are intended to give minorities a share in benefits that corresponds to their numbers in the population, though that sometimes means

that equally well- qualified whites or males are passed over. These individuals may not deny past patterns of racial discrimination, or even the need for some kind of remedial action, but they resist policies that they believe infringe on their rights to accomplish that end.

For this reason, affirmative action policies are condemned by some as form of "reverse discrimination," a charge that is vehemently rejected by people such as Justice Thurgood Marshall. In his dissent in *University of California Regents v. Bakke* (1978), Marshall argued that an historical legacy of unequal treatment necessitates that "we now must permit the institutions of this society to give consideration to race in making decisions about who will hold positions of influence, affluence, and prestige in America." He dismissed the majority's rejection of quota systems for admission to professional schools, complaining "it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible."

Groups other than blacks have also sought assistance from federal courts in fighting discrimination and seeking affirmative action. Though they are not a minority, women until recently have benefited from court decisions on affirmative action, sexual harassment, and discriminatory employment practices. A central element in these rulings is the equal protection clause of the Fourteenth Amendment. Yet many women's organizations find the equal protection clause (which does not mention gender) inadequate. In their view the clause offers uneven and uncertain protection against sex bias, because the Supreme Court lacks a clear standard for deciding what counts as sex discrimination. They contrast this uncertainty with the clarity of legal determinations in sixteen states which already make sexual discrimination illegal under their own state constitutions.

In 1972 Congressional supporters of this view proposed the Equal Rights Amendment to ensure that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." But the ERA failed to win approval from the requisite number of states, and died in 1982. Opponents of the ERA were able to persuade enough state legislators that passage of the Amendment might curtail privileges enjoyed by women under laws that took gender into account. Women might be drafted into the military, lose favored status in divorce and custody proceedings, and be deprived of

special work rules, if the ERA were adopted, said these opponents. For them, a kind of reverse discrimination was desirable in certain areas, while the Fourteenth Amendment provided grounds for challenging unwelcome forms of discrimination.

Cases of discrimination or allegations thereof involve conflicts of rights in which the claims of some individuals cannot be satisfied without compromising the rights of others. This is also true where abortion is concerned. Abortion is perhaps the most controversial political issue of our time, and it has been since 1973, when the Supreme Court issued its decision in *Roe v. Wade*. In that opinion a majority of the Court found unconstitutional state laws prohibiting or otherwise proscribing abortion during the first trimester of pregnancy. During the second trimester, the Court would accept only regulations intended to preserve and protect the health of a pregnant woman. Only in the third trimester, when the viability of the fetus is better assured, could states prohibit abortion. The Fourteenth Amendment provided the basis for the majority's opinion in *Roe v. Wade*. Justice Harry Blackmun wrote:

> *This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.*

This right, fundamental though it was, could nevertheless be limited by compelling state interests, e.g. the health of the mother or the viability of the fetus. However, the majority found no basis for considering the fetus as a "person" entitled to rights under the Fourteenth Amendment.

Not surprisingly, the Court's decision failed to settle the abortion issue, and in fact *Roe v. Wade* has since become the focal point of a great political battle between those who oppose "abortion on demand," and others who defend "freedom of choice." Lately, the Court has begun to reconsider its position, allowing states further leeway to regulate abortions. But any decision the states reach will be contentious. If they express support for abortion rights, opponents of abortion will undoubtedly increase their pressure on elected officials to refrain from assisting in any way those who want abortions. They may also

intensify protests at clinics where abortions are performed, taking direct action in the form of civil disobedience. On the other hand, if state governments restrict abortion, those who favor abortion rights will surely attempt to remove those restrictions by similar political actions.

In the upcoming struggle to define policies at the state level, each side in the abortion dispute seeks governmental support for its position, because each assigns government a decisive role in the preservation of individual rights and liberties. For those who oppose abortion, it is the obligation of government to protect the rights of the unborn by prohibiting or otherwise proscribing abortion – just as it is the responsibility of government to secure "life, liberty and the pursuit of happiness" for the living. Precisely for the same reason, however, supporters of abortion rights point to the need for policies to insure that pregnant women will be free to choose whether or not they will complete their term. To do otherwise would neglect women's rights, in their view. In short, no end to the dispute is in sight, for it involves a conflict of rights in which governmental authority is necessarily implicated.

Questions to Guide Discussion About Civil Rights

- In the realm of civil rights, government action is often needed to ensure that individuals and groups are not victimized by discrimination. What, in your opinion, are the basic limits of such government action? Are there areas of life and society that government should stay away from even if discrimination results?

- Advocates of the Equal Rights Amendment assert that the rights of women need to be given constitutional grounding and status. Do you agree? Are there other groups that might benefit from an amendment stating their rights?

- While the "equal protection" clause of the 14th Amendment was once an effective tool in attacking racial discrimination, it is now invoked by opponents of policies that are intended to benefit black Americans. How would you describe the issues in this controversy? How do you think the equal protection clause should be interpreted and applied?

- The Supreme Court has used the 14th Amendment to "nationalize" the Bill of Rights, guaranteeing that state and local governments treat their citizens in accordance with our national Bill of Rights. Can you think of abuses of rights that this "nationalization" has eliminated? Can you think of beneficial state and local practices or customs that have been eliminated by "nationalization?"

- Debates about abortion pit the asserted rights of women against the asserted rights of the unborn. From what sources do both sides derive their claims about rights? In other words, where do such rights come from?

- Contemporary conflicts over civil rights often involve disputes between two groups who both claim to be defending their rights. Can you think of a rule for deciding which claim should be given the greatest weight, or do such disputes have to be settled on a case by case basis?

Concluding Remarks

James Madison lamented in a letter to Thomas Jefferson that, "It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power; and that the line which divides these extremes should be so inaccurately defined by experience." As Madison knew, a perfect balance between power and liberty is difficult or impossible to maintain. That is no less true now, after two hundred years of experience with the Constitution, than it was in Madison's time.

The framers of the Constitution conceded the necessity of government for establishing law and order, and in general, securing the conditions under which individuals may pursue life, liberty, and happiness as they – and only they – understo d it. But the establishment of a government with sufficient power to secure liberty against various threats unavoidably creates a powerful new threat to liberty: that posed by government itself. In a very real and important sense, constitutional government involves the struggle to insure that political authority is only exercised on behalf of basic rights, and not against them. Madison contrived to set the branches of the national government against each other, believing that they would check and balance each other. Insisting upon greater participation in, and control over, the national government, Americans have changed Madison's Constitution to expand the voting electorate and to give voters a stronger voice.

But rights are not always safe in the hands of popular majorities. If government sometimes threatens rights, it often does so at the behest of popular majorities. Only rarely does a popularly elected government act independently of public opinion. Unease over the adequacy of protection for rights therefore arises, in part, from uncertainty about the willingness of majorities to refrain from using the undeniable powers of government to injure the interests of minorities. In short, the people, or at least the largest or most powerful part of them, may pose the greatest danger to rights. Against that danger, government can serve as a bulwark, opposing opinion, and acting on behalf of those whose rights have been denied. Whether a popular government will act this way, and succeed, is problematic, since popular governments are ultimately accountable to those whose actions must be regulated for minority rights to be safe.

We are fallible. By ourselves and through our political representatives we make errors, act without sufficient regard for others, or sometimes deliberately and maliciously violate the rights of fellow citizens. No humanly wrought system of government can protect completely against the weaknesses of humanity itself.

But the problem is deeper than imperfect practices. Even in principle, every right is restricted in various ways by other rights, duties, or considerations of public interest, however that may be understood. No rights are absolutely secure because all must be tempered with due regard for equally or more valuable concerns. In this sense, every right may be abridged legitimately, though certain rights are so fundamentally important that truly extraordinary circumstances must prevail before we may diminish them. These circumstances may be so unusual, and so remote, that for all practical purposes fundamental rights are inviolate, but they are not absolute in principle.

When we discuss whether the Constitution adequately protects our rights, our attention is drawn to the processes by which we limit or abridge rights. We ask if these processes guard against the denial or deprivation of rights without sufficient cause. When balances are struck, and certain rights (or the rights of certain people) are curtailed, is it done in ways that test the sufficiency of the cause? Are there effective avenues of appeal – judicial and political – for those whose rights are limited? Can new balances between contending rights be achieved reasonably, or do contests about rights lead to dissension and conflict?

These are truly constitutioaal questions, and our answers to them will determine our conclusions about the degree of protection afforded rights under the Constitution: If we as a society regularly fail to recognize legitimate rights, or if we systematically sacrifice more important rights to less important rights or concerns, then our Constitution is inadequate. For a constitution is not simply a blueprint for government. It is, fundamentally, a moral document designed to inform and improve the character of its citizens. A constituton that fails to elevate the character of its citizens, that fails to give them instruction about their rights and a due regard for the rights of others, is a political failure.

Over two hudred years ago the founding fathers examined the English constitution, saw political failure, and acted. A little over a decade later the

Federalists examined the Articles of Confederation, again saw political failure and acted. The Antifederalists, upon their examination of the Constitution, also feared political failure, and sought to prevent it by enumerating the rights of American citizens. On all three occasions, citizen action dramatically improved our system of government. We, too, must be similarly alert and ready to act. Otherwise, our Constitution will also be threatened with failure.

Questions to Guide Discussion About Relationships Among Types of Rights

- In a society that is "rights conscious," as American society surely is, individuals and groups sometimes make claims about rights that conflict. Can you think of examples of such conflicts? Can such conflicting claims be reconciled?

- It is also the case that different kinds of rights reinforce each other. That is, the full enjoyment of one type of right is only possible and meaningful if other types of rights are also secure. Can you think of examples of this mutual reinforcement?

- Of the types of rights examined in this discussion guide – rights of the accused, civil liberties, political rights, economic rights, and civil rights – are some more important than others? Why do you think so?

- Throughout history, different claims have been made about the sources of rights. Some root rights in an understanding of divine intent. Others claim the existence of natural rights, while still others think of rights as social conventions or agreements. Where do you think rights come from? Do different rights come from different sources? Is there a hierarchy among the sources of rights, such that some are more fundamental than others, or are all equally important?

The Constitution on Rights

Article I, Section 8

1. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article I, Section 9

2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
3. No Bill of Attainder or ex post facto Law shall be passed.

Article III, Section 2

3. The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Subsequent Amendments Concerned with Rights

Amendment XIII – Ratified December 6, 1865

Section 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV – Ratified July 9, 1868

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of law; not deny to any person within its jurisdiction the equal protection of the laws.

Section 2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for

services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Amendment XV – Ratified February 3, 1870

Section 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Amendment XVI – Ratified February 3, 1913

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII – Ratified April 8, 1913

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.
This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XIX – Ratified August 18, 1920

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Amendment XXIII – Ratified March 29, 1961

Section 1: The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the district would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the district and perform such duties as provided by the twelfth article of amendment.

Amendment XXIV – Ratified January 23, 1964

Section 1: The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Amendment XXVI – Ratified July 1, 1971

Section 1: The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Suggested Readings

Michael Kammen, ed. *The Origins of the American Constitution: A Documentary History*. New York: Penguin Books, 1986.

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Gary C. Bryner and Noel B. Reynolds, eds. *Constitutionalism and Rights*. Provo, Utah: Brigham Young University, 1987.

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